20 December 2013

The Executive Director,
Paul McKnight,
NSW Law Reform Commission,
DX 1227 Sydney

Dear Paul,

Re: Early Guilty Pleas

I refer to the above matter and, in particular, the questions posed in Consultation Paper 15.

The Public Defenders now respond to those questions as follows:

3.1

1) *Should a pre-charge bail regime be introduced in NSW?*

   Yes, on a trial basis and only if it subject to time constraints.

2) *What are your views on the advantages and disadvantages of introducing a pre-charge bail regime?*

   The option of pre-charge arrest involves bail being granted as a matter of course, but subject to conditions that may be onerous and for a period of time that may transpire to be lengthy. We note the disadvantages of the pre-charge bail system as it has operated in England and Wales which are set out in the consultation paper, in particular the analysis which suggests that it has been inappropriately used for evidentiary "fishing expeditions" and where its true purpose was poorly understood. This may have been to the detriment of many thousands of suspects, given the figure of there being 57,000 suspects under pre-charge bail at any one time. One can appreciate the potential for misuse by police as a form of behavioural control of suspects rather than as an unavoidable step in the investigative process.

   The primary feature of this system is pre-charge, or early charge, advice being sought from the DPP and being mandatorily followed. In some circumstances this may necessitate time to complete the brief of evidence before then referring it to the DPP for charging advice.

   We are strongly in favour of the police being required to obtain pre-charge advice based on the brief of evidence, and that advice being mandatorily followed in the formulation of the charges. We would regard such a scheme as a major break-through in speeding up the criminal trial and sentencing process.

   However, the justification for pre-charge arrest and bail is a separate consideration and is not as straightforward. It is only justifiable where there is a need for conditional liberty whilst the brief is completed and the appropriate charges indicated

by the DPP. Not all investigations and referrals to the ODPP for charging advice would require pre-charge arrest and it makes sense that arrest be a last resort.

If pre-charge arrest and bail is introduced in NSW, we strongly suggest that it be subject to a 14-day time limit subject to magisterial extensions and that the relevant legislation provide that the power to arrest for investigative purposes be a matter of last resort.

3) *If a pre-charge bail regime were introduced, should it aim to facilitate:*
   a) *ongoing police investigations and the finalisation of the police brief of evidence, and/or*
   b) *ODPP early charge advice?*

   Both; please see our answer to 2), above.

4) *What limits should be applied to any pre-charge bail regime?*

   Please see our answer to 2), above.

3.2

1) *Should a more extensive scheme of early charge advice between the police and the ODPP be introduced in NSW?*

   Yes. As we understand it, "early charge" advice is pre-charge advice which, in the English scheme, must be followed by police in formulating the charges. We acknowledge the advantages of this in the English system; the police brief being completed before the accused is formally charged and advice being received from the ODPP on the formulation of the charges. Thus it is more likely that the charges accurately reflect the evidence on which they are based and it is less likely that there is an on-going flow of fresh prosecution evidence up to and (in our experience, from time to tme) during any subsequent trial or sentence proceeding.

   Both these factors would certainly facilitate an earlier resolution of more criminal matters, by enabling counsel to give early advice to the accused based on a complete brief of evidence and to obtain early and firm instructions in relation to properly-based charges.

2) *If such a scheme were introduced:*
   a) *what features should be adopted*

   There should be embedded resources and a hotline;
   It should be mandatory for the police to follow the advice of the ODPP;
   There should be a trial period; see 2)c) below.

   b) *how could it interact with a pre-charge bail regime,*

   Pre-Charge arrest (and therefore pre-charge bail) should only occur in circumstances where there is an actual need for arrest before the suspect is formally charged; it is a secondary aspect of the process, the primary aspect being early charge advice.

c) what offences should it relate to?

There should be a trial period, during which time police are obliged to obtain early charge advice for all matters which are strictly indictable. This pilot period should be the subject of a study on the comparative cost benefits, focussing on whether there was a reduced incidence of trials and late pleas. Our expectation is that there would be a significant reduction.

3) How could such a regime encourage early guilty pleas?

The English experience indicates that such schemes result in an increase in pleas of guilty at the first hearing; see para 3.47 of the Consultation Paper. This is likely to be due to the matters noted in our response to question 3.1 2), above, concerning the greater likelihood that defence counsel would be of the opinion that the charges properly reflect the evidence, and that all of the police brief has been served at the outset.

4.1

1) How could charge negotiations in NSW be more transparent?

For the reasons noted above, a scheme of early charge advice along the lines of the English scheme would result in a significantly reduced need for charge negotiations, in particular, many of the negotiations which presently prompt some community concern, such as when a murder charge is reduced to a manslaughter charge shortly before trial in circumstances where the anticipated evidence has not changed since charging; in other words, where there was over-charging in the first place.

There would, however, remain a need for negotiation in other circumstances; for example, concerning whether some matters could appropriately be dealt with by a Form 1, the coming to light of additional witnesses that will affect the prosecution case, and so on. These latter matters are likely to be more immediately understood as necessarily requiring a re-casting of charges to reflect the evidence as it has changed since charging.

As noted in the Consultation Paper, the English system involves plea agreements being submitted to the Court and, presumably, becoming a public document. In some circumstances the Court may be invited by the Prosecution to review and approve, or disapprove, a proposed basis for a plea agreement. This would seem to be a reasonable manner for providing greater transparency in plea negotiations. However, it is likely to cause criminal proceedings to become more protracted. This would be offset by some trials which otherwise would have proceeded, resolving into negotiated pleas. On balance, we suggest that early charge advice be trialled and, if adopted, a re-assessment be done of the need for more transparent plea negotiations.

2) If charge negotiations are made more transparent, what impact would this have upon the likelihood that defendants will seek out a plea agreement?

Inevitably the impetus for a plea agreement is advice provided by the accused's counsel, following on an analysis of the brief and the taking of instructions. Greater

transparency, for example in the manner noted in our previous answer, is not likely to discourage accused persons from accepting advice that this course be pursued.

4.2

1) *Should NSW Crown prosecutors be able to incorporate sentencing outcomes into plea agreements?*

   No. We are not in favour of the prosecution and defence formally agreeing a particular sentencing outcome in a manner which ties the Court to that outcome.

2) *How could NSW Crown prosecutors incorporate sentencing outcomes into plea agreements?*

   See our response to 4.2 1), above.

3) *What would be the impact of incorporating sentencing outcomes into plea agreements on the number of early appropriate guilty pleas?*

   We think it would possibly result in accused persons who are contemplating a guilty plea instructing counsel as a matter of course to enter into pre-trial sentence negotiations with the prosecution. If this occurs, it would prolong proceedings where there would be a plea in any event and therefore is unlikely to contribute to an increase in early pleas.

4.3

Should the courts supervise/scrutinise plea agreements?

Please see our response to 4.1 1), above.

5.1

1) *Should NSW reintroduce criminal case conferencing? If so should case conferencing be voluntary or compulsory?*

   The Public Defenders have submitted in the past, and do again on this occasion, that criminal case conferencing is a poor substitute for the preferred model of early briefing of the defence and prosecution counsel who will ultimately appear on the matter at trial. When this occurs, the parties naturally negotiate the matter to a point where the matter resolves to a plea or proceeds to trial on the real issues in dispute.

   This accords with our experience. In some regional areas, both Public Defenders and Prosecutors are often briefed relatively early in the matter and there is a high rate of resolution into pleas or trials that focus on the real issues in dispute. In the city and other metropolitan areas, where a prosecutor is not briefed until the week before trial, meaningful negotiations do not occur until that late stage.

   We are of the opinion that the DPP needs to be appropriately funded so that it can facilitate the early briefing to the ultimate trial counsel of serious matters, and that this will address more successfully the issues that criminal case conferencing is intended to address.

2) *What are your views on the advantages and disadvantages of reintroducing criminal case conferencing?*

   Please see our response to 5.1 1), above.

3) *If criminal case conferencing were introduced, how could it be structured to improve efficiency?*

   Please see our response to 5.1 1), above.

6.1

1) *Should NSW adopt a fast-track scheme for cases likely to be resolved by a guilty plea?*

   The Consultation Paper relies on the English and Western Australian experience in developing this alternative.

   As to the English model, no doubt the fact that the police brief is completed at the time of the defendant being charged, and that he or she has had the benefit of legal advice on the brief for the purposes of questioning (under the English right to silence legislation and police station representation scheme), is of considerable assistance to the defendant's legal representative in giving advice as to whether to partake in the Early Guilty Plea Scheme ("the EGPS").

   We question whether the resources would be available for this scheme to operate in NSW. It would necessitate considered advice from the defendant's legal representative at an early stage and sufficient (if not full) service of the police brief in order for the legal representative to formulate that advice. It would be difficult, of not impossible, to stop the service (and tender to the Court) of further material after a plea was entered on that basis. The effect of such further material may be to change the case against the defendant, for example by providing a basis for the prosecution to submit on sentence that the offence is significantly more serious than they could have done on the evidence served at the time the plea was entered. The defendant is entitled to know the case against him or her in such important respects at the time an early plea is sought.

   We also question the need for such a scheme in NSW. The time between committal for sentence and arraignment in the District Court is Sydney is no more than ten days, and often within a week, since there are weekly arraignments. The time between arraignment and a sentence hearing in the District Court is around six weeks, even though there has been a significant back-log of trials in the last 18 months. It takes that period of time to organise witnesses, reports and representation, so a reduction of that time is not reasonably possible. This time frame is no worse (in fact, slightly better) than that which applies in the WA scheme; see para 6.22 of the Consultation Paper.

2) *If a fast-track system were to be introduced in NSW, how would it operate?*

   We are not in favour of a fast-track system.

3) *How would sentence discounts apply to a fast-track scheme?*

We suggest that there is a limit to the use of sentence discounts as an enticement to early pleas of guilty. There are significant disparities between custodial sentences handed down following an early plea compared to those handed down after a conviction at trial. The former are "discounted" sentences, partly justified for pragmatic policy concerns to do with the saving of community resources. However it is explained, the fact remains that an accused person who is convicted at trial will usually serve a significantly longer sentence for the privilege. It cannot be assumed that all accused who are convicted at trial are in fact guilty; from time to time wrongful convictions are discovered. The greater this disparity, the greater the danger that accused persons who are in fact innocent of the charges against them, but who face strong evidence to the contrary, will plead guilty for fear of serving a longer sentence, should they be convicted at trial.

For these reasons we are against the creation of a new category of even greater sentence discounts for a plea entered in an EGPS scheme. For the same reasons we are also against a movement of the existing maximum level of discounts to an EGPS scheme, and the withdrawal of that level of discounts for pleas later in the process.

6.2

1) *Should NSW adopt a program of differential case management?*

This question appears to relate to para 5.4 (page 72) of the Consultation Paper.

The Public Defenders are not in favour of case management applying "across the board" to all defence counsel. Where the need for case management does exist, it is linked to a particular culture of defence and prosecution representation which is unresponsive to other incentives to focus on the real issues in the case and utilise court and community resources economically. When applied to counsel who do act responsibly and efficiently, it is counter-productive; it detracts from an efficient and speedy preparation and resolution of cases by requiring counsel to prepare and/or settle formal court documentation concerning disclosure and issue identification.

2) *If a program of differential case management were introduced*
   a) *what categories should be created*
   b) *how should each of these categories be managed?*

Please see our response to 6.1 1), above.

7.1

1) *Should NSW maintain, abolish or change the present system of committals?*

The primary concern with committals expressed in the Consultation Paper seems to be whether it is an efficient use of resources. It is not clear how, if committal are abolished, this could facilitate more early guilty pleas.

In any event, when no evidence is called or tested, so that the committal is an exercise of making submissions based on the police brief, the committal takes little time and may filter out instances of over-charging, thus facilitating an early guilty plea.

An important aspect of committals is the ability for the defence and prosecution to test the evidence of a key prosecution witness, particularly where the witness's evidence is a weak but necessary link in the chain founding a charge. Legislative amendments over the years have substantially narrowed the opportunities for the parties to test a witness's evidence, but even within its narrow legislative confines it remains an important tool.

Public Defenders use the committal process to test the evidence of a witness sparingly. For example, a witness whose police statement is unclear or whose observations as an eye-witness may be impaired. Used in this way, by resolving such an issue, in our experience the committal often prompts a plea of guilty where the evidence bears out the content of the statement, or a reduction in charge or dismissal at committal by the magistrate. Either way, a trial is avoided.

It is far cheaper than the alternative of a *Basha* inquiry[1] in the district or Supreme Court, where that Court's resources are delayed whilst the *Basha* inquiry is conducted.

There are legislative exclusions on the calling of vulnerable witnesses and alleged victims which are intended to protect them from unnecessarily being called to give evidence at a committal; for example, s 91(8) of the *Criminal Procedure Act 1986* (NSW) concerning child sexual assault complainants and alleged victims of crimes of violence generally; s 93 of the same Act.

2) *If a case management system were introduced, what would it look like?*

As noted above, Public Defenders oppose case management by the court unless it is selective in its application. Otherwise, in relation to prosecutors and defence counsel who operate efficiently without court-supervised imperatives, it is counter-productive; it actually slows down the efficient disposal of matters by requiring counsel to comply with steps that are time-consuming and unnecessary.

Accordingly, we would favour a system of case management where the prosecution or defence can seek a court order to that effect or the magistrate can implement it of his or her own volition (but only after hearing from the parties), but is not obliged to do so. The form of Local Court case management may be the imposition of a timetable for disclosure.

7.2

When in criminal proceedings should full prosecution and defence disclosure occur?

Full prosecution disclosure should occur prior to committal, so that when the defendant is arraigned, he or she is aware of the full case against them. Defence disclosure is the subject of recent legislative changes.

8.1

1) *Should NSW reintroduce a sentence indication scheme?*

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[1] *R v Basha* (1989) 39 ACR 337 (NSW CCA)

Sentence indications have the potential to encourage a plea by providing a degree of certainty to the accused as to the outcome, should a plea of guilty be entered. They also engender a degree of cynicism in the community about the criminal justice system. In our view, the balance to be struck is by re-introducing them for matters not involving charges alleging violence and where the maximum penalty is in excess of ten years. This filter would leave major fraud and other white-collar crimes and major drug supplies and importations. This categorisation would also favour prosecutions by the Commonwealth DPP, which frequently account for the longest trials, on occasion tying up valuable court and personnel resources for months.

There may be an argument to also introduce them for some forms of sexual assault such as child sexual assault, where the complainant may thereby be spared giving evidence.

2) *If a sentence indication scheme were introduced, what form should it take?*

If sentence indications are re-introduced in this way, they would usually relate to custodial sentences. A sentence range should be indicated, and the key factors on which that nominated range depends, so that any departure from it is transparent in its reasons.

8.2

Once a defendant accepts a sentence indication, in what circumstances should it be possible to change it?

The Crown should be obliged to indicate, before the sentence indication is accepted by the accused, whether it would be bound by it (based on the expressed key factors) or whether it would reserve its right to appeal the sentence, should it be accepted by the accused.

9.1

1) *Should NSW introduce a statutory regime of sentence discounts?*

There is already a comprehensive regime of law as to the extent of and circumstances in which a reduction in sentence is appropriate. The primary distinction between NSW and other states is in the sources that are the foundation of that regime; whether by statute, common law or a combination of both. In this sense the table at page 137 of the Consultation Paper does not set out all aspects of the relevant sentencing law in NSW. For example, it is a principle of NSW sentencing law that in circumstances where the protection of the public requires it, or where the public interest is so offended, the offender does not receive any discount for an early plea; *R v Thomson & Houlton* [2000] NSWCCA 309 *per* Spigelman CJ at [157-158]. Legislation requires that where no discount is given, the sentencing judge records reasons for that decision; s 22(2), *Crimes (Sentencing Procedure) Act 1999* (NSW).

These principles are well-known and do not require further codification by reproduction in legislation. As a general rule, the Public Defenders favour the retention of the common law where legislation would only duplicate principles that

are already established in that form. This is because the common law has the flexibility to ensure individualised justice in response to novel factual circumstances.

An argument to the contrary may be that greater transparency to the community is achieved by re-stating principles in legislative form. We would question this assumption. There are judgements that bring together the relevant principles (for example, *R v Borkowski* [2009] NSWCCA 102 at [32] in an easily understandable passage. Finding the appropriate piece of legislation is not straightforward to a person who does not have a legal background, and cases are readily available on the internet. A particular case may be accessed with a single URL.

In any event, in our opinion, an increase in the number of early guilty pleas will not be facilitated by legislating the circumstances and quantum of a sentencing discount for an early plea.

2) *If a statutory regime of sentence discounts were introduced:*
   a) *what form could it take, and*

   Please see our response to 9.1 1), above.

   b) *to what extent should it be a sliding scale regime?*

   Please see our response to 9.1 1), above.

10.1

1) *Should the Local Court of NSW introduce case conferencing as part of its case management 150 processes?*
2) *Should the Local Court of NSW incorporate a summary sentence indication scheme?*
3) *If a summary sentence indication scheme were introduced:*
   a) *what form should it take; and*
   b) *what type of advance indication would be appropriate?*
4) *What effect will case conferencing have on the Local Court's efficiency and guilty plea rate?*

The Public Defenders defer to Legal Aid NSW and the Aboriginal Legal Service in relation to these questions, because our experience is confined to indictable matters.

Yours faithfully,

Mark Ierace SC
Senior Public Defender